

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DERRICK D. FONTROY, I

Plaintiff,

v.

M. PAULA TOSKI, et al.,

Defendants.

Civil Action No. 06-230 Erie

**MEMORANDUM JUDGMENT ORDER**

\_\_\_\_\_ Plaintiff's civil rights complaint was received by the Clerk of Court on October 5, 2006 and was referred to Chief United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. By Order dated April 2, 2008, this case was consolidated with a substantially similar civil action originally filed in the Johnstown Division of this District, *Fontroy v. Vincent*, No. 3:07-cv-220, with this case surviving as the lead case.

The Chief Magistrate Judge's Report and Recommendation [70], filed on December 30, 2008, recommends that the motion [60] for partial summary judgment filed by the DOC Defendants be granted, that Plaintiff's retaliation and Eighth Amendment deliberate indifference claims thereby be dismissed for Plaintiff's failure to exhaust administrative remedies, and that Defendant Kowalewski be terminated from this case. The Chief Magistrate Judge further recommends that, pursuant to the authority granted to courts in the Prison Litigation Reform Act: (i) Plaintiff's claims against unnamed defendants Jane Doe and Jane Hoe be dismissed because Plaintiff has failed to identify and serve said Defendants within 120 days in accordance with the requirements of Fed. R. Civ. P. 4(m), and (ii) Plaintiff's claims against unserved Defendants Salameh, Rouser, Cardenas, and unnamed Defendant John Doe be dismissed as frivolous.

The parties were allowed ten (10) days from the date of service in which to file objections. Service was made on Plaintiff by certified mail at the SCI Laurel Highlands

where he is incarcerated, and on the Defendants. No objections were filed. After de novo review of the complaint and documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 30<sup>th</sup> day of January, 2009;

IT IS ORDERED that the motion for partial summary judgment filed by the DOC Defendants [60] be, and hereby is, GRANTED, and JUDGMENT is hereby ENTERED in favor of the DOC Defendants and against Plaintiff with respect to Plaintiff's retaliation and Eighth Amendment deliberate indifference claims, due to Plaintiff's failure to exhaust administrative remedies. In accordance with the foregoing, Defendant Kowalewski's status as a Defendant in this case will be terminated, as the only claim asserted against her is the Plaintiff's unexhausted Eighth Amendment claim based on alleged deliberate indifference to Plaintiff's serious medical needs.

IT IS FURTHER ORDERED that, pursuant to the Court's authority under the Prison Litigation Reform Act: (i) Plaintiff's claims against unnamed Defendants Jane Doe and Jane Hoe be, and hereby are, DISMISSED for Plaintiff's failure to identify and serve said Defendants within 120 days as required by Rule 4(m) of the Federal Rules of Civil Procedure, and (ii) Plaintiff's claims against unserved Defendants Salameh, Rouser, Cardenas, and unnamed Defendant John Doe be, and hereby are, DISMISSED inasmuch as these Defendants have never properly been served and, in any event, the only claims against these Defendants have either been voluntarily withdrawn or have been found herein to be unexhausted.

As a result of the foregoing, the only claim remaining in the case is Plaintiff's previously stayed legal mail claim against all remaining DOC Defendants.

The Report and Recommendation of Chief Magistrate Judge Baxter, dated December 30, 2008 [70], is adopted as the opinion of this Court.

s/ SEAN J. McLAUGHLIN

Sean J. McLaughlin  
United States District Judge

cc: all parties of record  
Chief U.S. Magistrate Judge Baxter